United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING

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76-1458

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1458

UNITED STATES OF AMERICA,
Appellee,

—against—

ALBERT ANZALONE and ANTHONY VIVELO,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
RONALD E. DEPETRIS,
Assistant United States Attorneys,
Of Counsel.

PRELIMINARY STATEMENT

The United States of America, by David G. Trager, United States Attorney for the Eastern District of New York, hereby petitions for rehearing of the decision of a panel of this Court (Circuit Judges Feinberg, Gurfein and Meskill) entered on May 6, 1977, which reversed the judgment of conviction of appellants on certain counts and ordered the dismissal of the underlying indictment on those counts. The petition for rehearing is filed pursuant to Rule 40 of the Federal Rules of Appellate Procedure.

After a jury trial before the United States District Court for the Eastern District of New York (Neaher, J.), both appellants were convicted of making false declarations before a grand jury in violation of 18 U.S.C. §1623, and of a civil rights substantive offense in violation of 42 U.S.C. §3631. Appellant Vivelo was also convicted of a civil rights conspiracy in violation of 18 U.S.C. §241.

The convictions arose from a series of incidents of vandalism and arson in which appellants and others endeavored to prevent a black family from moving into a house located on the block on which appellants reside. Pursuant to the use immunity provisions of 18 U.S.C. §6002-6003, both appellants testified before the federal grand jury which investigated these matters.

In its decision this Court affirmed the convictions on the false declaration counts, involving appellants' testimony before the federal grand jury denying participation in one of the incidents -- shooting out the front windows of the house. However, this Court reversed the convictions on the civil rights counts. The ground for the reversal was the fact that the same federal grand jury which heard appellants' immunized testimony indicted them on these counts (albeit appellants' immunized grand jury testimony was exculpatory and consisted of denials as to participation in the events involved in the civil rights offenses).

The basis for this petition for rehearing is provided by the fact that appellants' claim as to the validity of the indictment is untimely and has been waived pursuant to the provisions of Rule 12(b),(c),(f), Federal Rules of Criminal Procedure. This point was raised in our brief on appeal (p. 37; see also pp. 21-23). We respectfully submit that the Court either "overlooked or misapprehended" (Rule 40, Federal Rules of Appellate Procedure) this point concerning waiver of the claim as to the validity of the indictment, which the Court did not address in its opinion. 1/

1/ This Court has, of course, recently recognized the applicability of the waiver provisions of Rule 12. See United States v. Rodriguez, ___F.2d____ (2d Cir. May 11, 1977, slip op. 3429, at 3433); United States v. Gogarty, 533 F.2d 93, 95-96 (2d Cir. 1976) (Gurfein, J.); United States v. Macklin, 523 F.2d 193, 195, 197 (2d Cir. 1975) (Gurfein, J.).

Accordingly, we bring this petition for rehearing.

REASONS FOR GRANTING THE PETITION

(1)

Appellants' immunized federal grand jury testimony was given on April 29, 1975.[2/] The testimony was exculpatory and consisted of denials as to participation in the events involved in the civil rights offenses. (Gov. A. 199-256, 257-303.)

Thereafter the grand jury indicted appellants on civil rights and false declaration offenses. On January 8, 1976 the district court scheduled the trial for May 3, 1976, and extended the return date for all pretrial motions to April 5, 1976 (see the transcript of Jan. 8, 1976). At that time the importance of having a firm trial date and resolving all pretrial motions prior thereto was discussed (transcript, pp. 9, 16). Appellants did make various pretrial motions, but none were addressed to the matter of the immunized federal grand jury testimony (see App. A. 435-459).

On May 3, 1976, when the case was called for trial, appellants for the first time brought up the matter of the immunized federal grand jury testimony. It was brought up in the context of, and as a basis for, a motion to sever the civil rights and false declaration counts for separate trials.

2/ The grand jury was instructed by the Assistant United States Attorney that it could not use this testimony against the witness in connection with, or in voting on an indictment alleging, civil rights offenses (Gov. A. 194-198).

Essentially appellants' claim was that introduction in evidence at trial of the grand jury testimony as contained in the false declaration counts would constitute a prohibited "use" of that testimony against defendants on the civil rights counts, even if a limiting instruction was given to the jury prohibiting any such use. The district court did not grant the severence motion. (App. A. 21-88). The case then proceeded to trial.

During the course of discussion on the severance motion, appellants pointed out that the same reasoning applied to the situation before the grand jury, and thus the grand jury could only properly vote on a perjury indictment. However, appellants did not specifically move then, or at any other time below, to dismiss the indictment on this ground (App. A. 83-88). Further, the district court never ruled on this contention. Nor did appellants ever ask or press for a ruling on this point. Indeed, when appellants did raise the matter of their immunized testimony again after the jury had been impaneled and sworn, they referred only to the application for a severance, and did not move for dismissal of, or seek a ruling concerning the validity of, the indictment. (Trial transcript, May 11, 1976, pp. 13-14).

It would appear, then, that appellants were content to rest on their severance motion regarding their immunized federal grand jury testimony. It was on this appeal that appellants, for the first time, specifically sought dismissal of the indictment on this ground.

(2)

Rule 12(b) of the Federal Rules of Criminal Procedure requires that the following be raised prior to trial:

> (1) Defenses and objections based on defects in the institution of the prosecution; or
>
> (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings);
>
> * * *

Rule 12(c) provides for the court to set a time for pretrial motions. Rule 12(f) provides that the failure to make these objections "at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver".

As noted above, appellants did not attack the validity of the indictment on the ground involved herein within the time set by the district court for the making

of pretrial motions (that is, by April 5, 1976). Nor did the district court ever extend this return date for pretrial motions. Nor was there ever a request for an extension. Accordingly, appellants' claim on this appeal attacking the validity of the indictment has been waived by the express provisions of Rule 12.

The Supreme Court has made clear that the waiver provisions apply, even though the claim is based on an alleged deprivation of a constitutional right. Davis v. United States, 411 U.S. 233, 236-242 (1973) (holding that the waiver provisions of Rule 12 are applicable to an untimely claim of unconstitutional discrimination in the composition of a grand jury). The Court set forth the underlying policy of Rule 12 as follows (Id. at 241):

> If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.

Relief may be granted from the waiver provision for "cause shown". However, appellants have not even endeavored to show that there is "cause" warranting relief from the waiver.

Further, under the circumstances of this case, appellants could not make a showing of cause warranting such relief. Appellants and their trial counsel were aware of the facts underlying their claim at the time of the indictment, and at all relevant times thereafter. Indeed, appellants' trial counsel had represented them at the time when the immunized federal grand jury testimony was given. Moreover, appellant Anzalone had made a timely motion seeking dismissal of the indictment based upon an alleged improper use of his immunized state grand jury testimony.[3/] Yet appellants did not make any pretrial motion relating to their immunized federal grand jury testimony within the time set by the district court. Under these circumstances the claim is waived. See Davis v. United States, supra; Shotwell Mfg. Co. v. United States, 371 U.S. 341, 362-364 (1963); Morris v. Sullivan, 497 F. 2d 544, 545-46 (5th Cir. 1974); United States v. Wilson, 434 F.2d 494, 496 (D.C. Cir. 1970); Brooks v. United States, 416 F.2d 1044, 1047-48 (5th Cir.

3/ This claim was rejected by the district court and by this Court in its decision on appeal.

1969), cert. denied, 400 U.S. 840; United States v. Campisi, 306 F.2d 308, 311-312 (2d Cir. 1962), cert. denied, 371 U.S. 925; United States v. Garnes, 156 F. Supp. 467, 470-71 (S.D.N.Y. 1957), aff'd, 258 F. 2d 530, 534-35 (2d Cir. 1958), cert. denied, 359 U.S. 937.

Appellants did raise the matter of their immunized federal grand jury testimony on the opening day of trial in the context of a motion for severance. As noted, they alluded to their present contention that the indictment was invalid. Yet the only motion made was one for severance, not dismissal of the indictment on this ground. Appellants did not ask or press for a ruling by the district court on this point. Thus the district court simply never reached this issue.

It would appear that appellants were content to rely on their severance motion, and proceed to trial. At all events an application for dismissal of the indictment on the opening day of trial would have been untimely, and would not have warranted a ruling at that belated time. All parties had prepared for, were present, and ready to proceed to trial. The burden and resulting delay which would be caused by considering and curing an alleged defect in the indictment on the opening day of tiral would not be warranted, and would only serve to undermine the policy considerations of the waiver

provisions of Rule 12. United States v. Campisi, supra. See also Brooks v. United States, supra; United States v. Garnes, supra. Further, this reasoning applies with special force to the situation herein. Albeit appellants alluded to the claim on the opening day of trial, appellants not only did not make a written motion to dismiss with citation of any authorities, but also never made clear to the district court that they were seeking dismissal of the indictment, and never pressed for or obtained a ruling by the district court on the contention. Thus, to permit this issue to be untimely raised would frustrate the purpose of Rule 12 which is, of course, "to prevent unnecessary trials". United States v. Swainson, 548 F.2d 657, 663 (6th Cir. 1977).

Moreover, a showing of actual prejudice should be required as a prerequisite for granting relief from the waiver. See Davis v. United States, supra, 411 U.S. at 244-245; Shotwell Mfg. Co., v. United States, supra, 371 U.S. at 363; Brooks v. United States, supra, 416 F.2d at 1048, n.1. To show actual prejudice in the context of the claim made herein, appellants would have to establish that the indictment on the civil rights counts was obtained on the basis of appellants' immunized federal grand jury testimony, rather than on the basis of the other independent evidence before the grand jury. However, since appellants' immunized testimony consisted of denials as to participation in the events involved in the civil rights offenses, since the grand

jury was instructed not to use this immunized testimony on the civil rights counts, and since there was ample independent evidence before the grand jury to warrant the indictment on the civil rights counts, appellants cannot establish actual prejudice underlying their claim. Indeed, the grand jury could not have concluded that the testimony was false (as alleged in the false declaration counts) without concluding on the basis of independent evidence that appellants had participated in the civil rights offenses.

The panel in its decision herein set forth a per se rule governing the situation where the grand jury which handed up the indictment heard the immunized testimony, in effect presuming prejudice arising from such a situation. However, while considerations of policy may justify presuming prejudice where a timely objection is made, Davis made clear that the absence of actual prejudice justifies a denial of relief from an express waiver provision (411 U.S. at 245):

> The presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner.

Accordingly, appellants should be held to the waiver provisions of Rule 12, Federal Rules of Criminal Procedure, concerning their claim as to the validity of the indictment.[4/]

4/ As previously noted, appellants did move for a severance before the district court on the ground that the introduction in evidence at trial of their immunized grand jury testimony (as alleged to be false in the indictment) on the false declaration counts before the same petit jury which would consider the civil rights counts would constitute a prohibited use of that testimony. The district court denied the severance motion.

In light of its decision on the validity of the indictment, the panel did not address this issue on the appeal. However, if we are correct that the claim as to the validity of the indictment has been waived, the panel may well have to address this issue.

We respectfully submit that in the context of this case, involving false exculpatory grand jury testimony and an effective limiting instruction, there was no prohibited use made of the testimony. The point was discussed at length in our brief on appeal (pp. 26-34). We rely on our position as stated therein.

CONCLUSION

For the above-stated reasons the petition for rehearing should be granted, and the judgment of conviction on all counts should be affirmed.

Dated: Brooklyn, New York
June 20, 1977

Respectfully submitted,

DAVID G. TRAGER
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Eastern District of New York

BERNARD J. FRIED,
RONALD E. DEPETRIS,
Assistant U.S. Attorneys,
(Of Counsel)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

DOLORES M. BYRD being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 20th day of June 19 77 he served a copy of the within

PETITION FOR REHEARING

by placing the same in a properly postpaid franked envelope addressed to:

HARVEY L. GREENBERG, ESQ.,
16 COURT STREET
BROOKLYN, NEW YORK 11241

MICHAEL P. DIRENZO, ESQ.
15 COLUMBUS CIRCLE
NEW YORK, NEW YORK 10023

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Dolores M Byrd

Sworn to before me this
20th day of June 19 77

Barbara A. Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979